22473 ✓

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

--oOo--

CLARENCE E. MATTOS, SR., and CLARA MATTOS,	)
Appellants,	)
vs.	)
UNITED STATES OF AMERICA, JOHN J. VAUGHN, NEWTON WAKEMAN, WILLIAM HICKEY, CAPTAIN TUCKER, DOE I THROUGH DOE XI,	)
Respondents.	)

CIVIL. S-68-87

APPELLANTS' BRIEF

DANIEL J. WESTON
1510 Merkley Avenue
West Sacramento, California

Attorney for Appellants

S Printing - Sacramento

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Continued)

CASES (Continued)

CODES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

--oOo--

CLARENCE E. MATTOS, SR., and CLARA MATTOS, Appellants, vs. UNITED STATES OF AMERICA, JOHN J. VAUGHN, NEWTON WAKEMAN, WILLIAM HICKEY, CAPTAIN TUCKER, DOE I THROUGH DOE XI, Respondents.	)	CIVIL: S-66-37

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of California entering an Order of Dismissal in favor of all the defendants and against the plaintiffs therein (and Appellants herein). The effect of such dismissal before trial on the merits was to prevent the plaintiffs from bringing suit against any person in either Federal Court of State Court for the wrongful death of their son. The further effect of such Order of Dismissal was to hold that appellants, as a matter of law, could not plead nor prove a cause of action against any of the defendants.

This action was commenced in the Superior Court of the State of California in and for the County of Sacramento as action No. 169709.

This action was removed upon motion of the respondent. United States, to the United States District Court for the Eastern District of California pursuant to Title 28 U.S.C. section 2679(d), on the grounds that

(a) the plaintiffs sought judgment for damages resulting from the negligent operation of a motor vehicle by defendant JOHN J. VAUGHN: (b) at the time of the alleged accident, defendant JOHN J. VAUGHN was acting within the scope of his employment as an employee of the United States: (c) the exclusive remedy by suit available to the plaintiffs within the meaning of Title 28 U.S.C. section 2679 (b) is against the United States: (d) the United States District Courts have original jurisdiction of such actions against the United States pursuant to Title 28 U.S.C. section 1346(b): (e) and a removal was also proper pursuant to Title 28 U.S.C. section 1442 (a) for the reason that plaintiffs seek judgment against defendants NEWTON WAKEMAN, WILLIAM HICKEY, G. B. TUCKER, and JOHN J. VAUGHN, on account of acts or omissions allegedly done under the color of their status as members of the armed forces of the United States. The United States was subsequently substituted for JOHN J. VAUGHN as a defendant to the action pursuant to Title 28 U.S.C. section 2679 (b). At this point, the posture of the suit was that the plaintiffs were suing the defendants under the provisions of the Federal Tort Claims Act.

Thereupon, the United States moved for dismissal in favor of itself on the basis of the Feres Case. (Feres vs. United States, 340 U.S. 135, 1950.) A motion was granted on the grounds that the Feres Case was a judicially created exception to the direct statutory language of the Federal Tort Claims Act. (Said act permitting persons injured by Federal employees to bring suit against the United States.)

The United States also moved for dismissal against the remaining defendants WAKEMAN, HICKEY, TUCKER (and in effect, VAUGHN) on the grounds that since the alleged negligence was committed while they were employees of the United States on reserve military training exercises,

that such Federal employees were totally exempt from suit, either in Federal Court or State Court. The District Court granted both motions thereby denying the plaintiff a cause of action against the United States under the Federal Tort Claims Act and also preventing the plaintiffs, once the United States was dismissed from the case, from remanding the case to the State Court for suit against VAUGHN and/or the other defendants.

Plaintiffs down below and appellants herein, filed timely notice for appeal and the case is properly before this court.

STATEMENT OF FACTS

This is a wrongful death suit brought by CLARENCE E. MATTOS, SR., and CLARA MATTOS, the parents of their deceased son, CLARENCE E. MATTOS, JR. (hereafter CLARENCE MATTOS).

CLARENCE MATTOS was a member of the Marine Corps Reserves. Several months prior to the fatal accident on June 4, 1966, he had finished his active duty service with the Marine Corps. On June 4, 1966, he was participating in a Marine Corps Reserve training exercise as a "weekend warrior". He participated in reserve training activities one weekend a month but was otherwise a civilian citizen.

At the time of the accident, in which CLARENCE MATTOS was killed, a fellow reservist, JOHN VAUGHN, was driving, and CLARENCE MATTOS was riding, in a two and one-half ton, six by six M-35 truck belonging to their reserve unit. Both were members of the "Drivers Training Platoon" of said reserve unit. The driver, JOHN VAUGHN, was a minor, under the age of 21 years.

On the day of the fatal accident, both were participating in a driver training exercise. The truck in which the deceased was riding was

the last in a convoy. The truck, while rounding a curve on a public highway, at a dangerous and excessive speed, was caused to leave the road and turn over causing the death of CLARENCE MATTOS, a passenger. CAPTAIN NEWTON WAKEMAN was the Commanding Officer of the above-mentioned reserve unit, LT. WILLIAM HICKEY was the Platoon Commander of the Drivers Training Platoon of the above-described reserve unit, and CAPTAIN TUCKER was the Inspector-Instructor of said reserve unit.

As a result of this accident, the plaintiffs filed suit alleging inter alia that the driver wilfully and wantonly operated said vehicle; that with wilful and wanton disregard for the safety of the deceased and other persons, the defendants supervised and entrusted said vehicle to the minor driver. Plaintiffs also sued Doe V and Doe VI as the parents of minor driver VAUGHN, said parents having signed VAUGHN's driver license application and responsible under Chapter 2 of Division 9 of California Vehicle Code.

As a result of the dismissal below, the plaintiffs have been prevented, as a matter of law, from introducing evidence to support said allegations.

SPECIFICATION OF ERRORS RULED ON

1. The District Court erred in its Order dismissing the defendant UNITED STATES from the action of erroneously ruled that the Feres Case exception to the Federal Tort Claims Act should be extended to weekend reservists.

2. The District Court erred in its Order dismissing as to the other remaining defendants and erroneously ruled that weekend reservists are totally exempt from suit for their negligence or wilful and wanton misconduct if such misconduct was perpetrated while on weekend reserve activities. See Memorandum and Order pages 42-45 of Transcript of Record;

reported Mattos vs. United States, 274 F. Supp. 39, 1967.)

QUESTIONS PRESENTED

1. Whether the Feres Case exception to the Federal Tort Claims Act, which case provided that the United States cannot be liable under the Federal Tort Claims Act for injuries to servicemen arising from activities incident to military service involving regular members of the armed services --- should be extended to weekend reservists.

2. Whether under Federal Law, weekend reservists, have total immunity from being sued for their negligent or wilful and wanton infliction of injury on fellow reserve members.

ARGUMENT

I. THE FERES CASE EXCEPTION TO THE FEDERAL TORT CLAIMS ACT DEALING WITH REGULAR MEMBERS OF THE ARMED SERVICES, SHOULD NOT BE EXTENDED TO WEEKEND RESERVISTS.

The older rule, born and nutured in antiquity was that "you cannot sue the Soverign". For a long period, the United States Government was shielded by this doctrine of soverign immunity and resulted in what Justice Frankfurter once described as a "privileged position" of "legal irresponsibility" for tort. Thus shielded by soverign immunity, the United States was under no legal obligation whatever to respond in damages to anyone who sustained injury or loss through the tortious conduct of its employees.

This era of "irresponsibility" ended in 1946 by the enactment by Congress of the Federal Tort Claims Act. This act provided a comprehensive remedy against the United States for personal injury, death, or property damage, resulting from the torts of Federal employees. The Act has a

section which lists types of claims that are excluded, Title 28 U.S.C. section 2680. No exclusion is provided exempting the United States from suit for injuries or death of servicemen arising out of, or in the course of, activity incident to military service.

The Feres Case (Feres vs. United States, 340 U.S. 135, 1950) judicially created such an exception by holding that the United States could not be sued under the Federal Tort Claims Act by a regular member of the armed services who suffered death or injury arising out of activity incident to military service. Appellant argues that the Feres Rule is a judicially created exception to the apparently absolute language of the Federal Tort Claims Act (See Title 28, U.S.C. section 1346 (b)) and as such should be limited to regular members of the armed forces.

And no cases have been found extending the Feres Rule directly to reservists injured or killed by fellow reservists while participating in weekend drill. The opinion in Drumgoole vs. Virginia Electric & Power Company, 170 F. Supp. 824 (1959), which was cited below by the United States does state that the Feres Rule "includes the enlisted reserve when in training" (page 825), but it does so without any discussion whatever, and without any indication as to whether the claimant there was engaged in week-end training as opposed to prolonged (i.e. six months) training. The opinion, therefore, is not persuasive authority for present purposes. Moreover, the policy underlying the Feres Rule, to-wit, "the necessity of maintaining military discipline", has little or no pertinence to claims for injuries to weekend reservists. Surely, the need for maintaining discipline among the civilian members of a weekend reserve unit is not sufficiently compelling, and the threat of a breakdown of such discipline is not a sufficiently serious evil, to warrant leaving plaintiffs without a

remedy for the death of their son. It hardly seems likely (or even remotely possible) that the litigation of such a claim such as the present one, will "reduce the armed forces of the nation to a rabble dangerous to their friends and harmless to their enemies". (Defendants' motion, page 26 of Transcript of Record.) The situation of a weekend reservist bears no similarity, for present purposes, to that of his regular counterpart, who is in day to day contact with his superiors, and who, in fact, might cause undue disruption of military discipline if he were free to litigate claims against them.

In O'Brien vs. United States, 192 F. 2d 948 (1951) cited below by the United States, the deceased was killed while in the process of getting ready to take an airplane ride. This ride was requested by the deceased and was permitted as part of indoctrination upon joining the reserve unit. None of the facts indicate that the deceased was participating in reserve drill activities. Without discussion of the weekend reserve issue the court relied on the Feres Case as the basis for the dismissal against the United States, appellant contending that such reliance constituted an unwise and inadequately considered extension of the Feres Doctrine.

In United States vs. Carroll, 369 F. 2d 618 (1966) cited below by the United States, the deceased was not on weekend reserve duty at the time of death, but was killed while riding in a Government airplane. Furthermore, the deceased was not killed by a fellow weekend reservists but rather by a pilot on active duty. Moreover, the Carroll Case relied on the cases previously considered and mentioned above which cases constitute unwarranted extensions of the Feres doctrine which, initially, only involved regular members of the armed services.

The Federal Tort Claims Act was enacted by Congress to ameliorate the harsh and inhuman doctrine of soverign immunity. The Feres Case was a judicially created exception to the direct language of the Federal Tort Claims Act and was limited to regular members of the armed services. Although the Supreme Court has not ruled on this precise issue, there do appear to be cases as mentioned which seem by indirection or dicta to extend the exclusion to injuries to and by weekend reservists. As more and more of the civilian citizens of the United States are requested or volunteer to serve in their country's defense by participating as reservists, where they set aside occasional weekends for this purpose, it is clear that a further extension and creeping of the Feres Doctrice to include them takes on serious implications beyond that contained in the original Feres decision. Each unwise and unwarranted extension of the Feres case brings us ever closer to a return of soverign immunity, the harshness of which prompted the enactment of the Federal Tort Claims Act. The rights of citizens to sue the United States Government should not be abridged by casual or careless extensions of immunity, particularly where they appear to be judicially created in the face of the absolute language of the Federal Tort Claims Act. (Title 28 U.S.C. 2679 (d), Title 28 U.S.C. Section 1346 (b)).

If this MATTOS decision is permitted to stand as rendered in the court below, it means that weekend reservists who are injured cannot seek redress against the Government by Court process. This tends to make weekend reservists "second class citizens" and judicially disadvantage by virtue of their service in the reserves, thus adding further hazards and disadvantages to reserve service.

II. WHEN THE UNITED STATES IS SUBSTITUTED FOR A DEFENDANT UNDER THE FEDERAL TORT CLAIMS ACT, AND THEREAFTER THE UNITED STATES APPROPRIATELY MOVES FOR DISMISSAL

OF ITSELF UNDER THE FERES IMMUNITY DOCTRINE, THE COURT SHOULD NOT DISMISS AS TO ALL THE FEDERAL EMPLOYEE DEFENDANTS, BUT SHOULD RATHER REMAND THE CASE PURSUANT TO TITLE 28 U.S.C. 2679 (d).

The United States having removed this case to the District Court, thereupon made a motion to have itself substituted for the defendant driver VAUGHN. (See pages 17-19 Transcript of Record). The United States relied upon Title 28 U.S.C. section 2679 (b), which provides as follows: (emphasis added)

> "The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or emission gave rise to the claim." (See Appendix I)

The exclusiveness of that section permitting substitution is premised upon there being a remedy for the plaintiff under the Federal Tort Claims Act. If in fact there is no remedy thereunder (because of the Feres Doctrine amendment thereto), then that section does not provide for exclusiveness.

In effect, the United States told plaintiffs "you cannot sue VAUGHN because you have a remedy against me". After substitution then the United States said "I am sorry, you don't really have a remedy against me because of the Feres Rule, so let's dismiss the whole case."

The Court below in dismissing as to all defendants granted them that which the court frankly characterized as "immunity". (See page 43, line 19 of Transcript of Record.) The court relied upon Bailey vs. Van Buskirk, 345 F. 2d 299 (1965). The case is not persuasive authority for such a momentous proposition.

The relationship between CLARENCE MATTOS and JOHN VAUGHN

was not the relationship of a subordinate to his superior as in the Bailey case, but, rather, they were fellow weekend reservists of the same rank. (See page 28 lines 30 and 31 of Transcript of Record.) Furthermore, the Bailey case did not involve a consideration of the exclusiveness provisions of Title 28 U.S.C. section 2679 (b) nor the question of remand under 2679 (d). Moreover, the Bailey Case without reasoned consideration, relied on the Feres Case. The Feres Rule was that a serviceman cannot sue the United States Government. It does not stand for the proposition that a weekend reservist is immune from suit himself individually in both Federal and State Court for the wilful and wanton or negligent causing of the death of another. If in fact, weekend reservists were totally immune from suit, the United States below could have so argued and moved for dismissal directly without going through the motion of having itself substituted for defendant VAUGHN. The United States is attempting to, by indirection, that which it has no authority to do directly.

If the plaintiffs had a remedy against the United States, the United States should not have been dismissed as a party. If the plaintiffs did not have a remedy against the United States, then the United States should not have been substituted for the defendant driver VAUGHN.

The United States was substituted under Title 28, section 2679 (b). If the United States should later be dismissed, the District Court should have remanded the case to State Court. The clear and unequivocal language of section 2679 (d) provides: (emphasis added).

> "Upon certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State Court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States for the District and Division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this Title and all references

thereto. Should the United States District Court determine on a hearing on a motion to remand held before a trial on the merits, that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State Court."

Once the District Court invoked the Feres Immunity Rule in favor of the United States, then it became clear in the words of the aforementioned section that the case was "one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States ...". At that point, the court should have remanded the action in accordance with the above cited section.

This problem was considered in Tavolieri vs. Allain, 222 F. Supp. 756 (1963). In this case, plaintiff brought suit in the State Court for injuries caused by Government employee negligently driving a motor vehicle while in the course and scope of employment. The United States removed the case to the Federal Court under Title 28, U.S.C. 2679 (b) on the grounds that the plaintiff had a remedy against the United States under the Federal Tort Claims Act. It later appeared that the plaintiff did not have a remedy under section 2679 (b) and the court remanded the case in accordance with section 2679(d).

The court reasoned on page 759 of the Opinion: (emphasis added)

"Suppose, for example, that the pleadings in the State Court and the removal papers show that plaintiff's damage was caused by the operation of a motor vehicle by an employee of the Government while acting within the scope of his employment, but the pleading did not reveal, what would be revealed by extrinsic evidence, that the Government employee and plaintiff were in the military service and the injuries arose out of activity incident to service. In such a case, plaintiff would not have a remedy available under section 1346 (b) or any other provision of the Federal Tort Claims Act. Feres vs. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152. The removal would have been improper; and not to permit remand would cause plaintiff to lose his opportunity to sue the employee personally."

Many decisions have held that where a case is removed on the

basis of section 2679(b) and it later appears that the plaintiff does not have a remedy against the United States under the Federal Tort Claims Act, that the case should be remanded under section 2679(d). See Adams vs. Jackel, 220 F. Supp. 764 (1963), Atnip vs. United States, 245 F. Supp. 386 (1965), Jarrell vs. Gordy, 162 So. 2d 577 (1964). In the Jarrell Case, the court held that where a claim is asserted in a State Court against a Federal employee for the negligent operation of a motor vehicle, such employee does not become immune to liability under section 2679(b) unless and until the United States accepts responsibility for the employee's conduct.

CONCLUSION

Again, we return to the simple proposition which requires reversal in this case, and that is, if the plaintiffs had a remedy against the United States under the Federal Tort Claims Act, the United States should not have been dismissed as a party. And, if the plaintiffs did not have such a remedy against the United States, then the United States should not have been substituted for the driver VAUGHN, and the United States should not have been successful in removing the case to the Federal Court upon such a representation that there was such a remedy. Once the lower court determined that there was no remedy for the plaintiff under the Federal Torts Claims Act, it had no jurisdiction to enter a dismissal but should have remanded to the State Courts in accordance with the clear and unequivocal language of the latter part of section 2679(d). In conclusion, appellants argue (1) that the United States should still be a party under the Federal Tort Claims Act since the Feres Decision should not be extended to give the United States immunity from suit under such Federal Tort Claims Act; and, in the alternative,

(2) if the United States is dismissed because the plaintiff has no remedy against the United States, then the Federal Court has jurisdiction only to remand the case to the State Court as previously stated.

Respectfully submitted,

DANIEL J. WESTON

By_____
Attorney for Appellants

APPENDIX I

APPENDIX I

Section 2679(b) of Title 28 U.S.C. was amended July 18, 1966. Pub. L. 89-506 section 5(a), 80 Stat. 307. Section 10 of Pub. L. 89-506 provided that: "This act (amending section 2679(b)) shall apply to claims accruing six months or more after the date of its enactment."

As amended section 2679(b) reads as follows:

> "The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or emission gave rise to the claim."

The inclusion of section 2672 into this section 2679(b) providing for exclusiveness of remedy, does not materially affect the rights of the parties in this action.